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**FEDERAL ELECTION COMMISSION**  
**999 E Street, NW**  
**Washington, DC 20463**

**FIRST GENERAL COUNSEL'S REPORT**

**CELA**

MUR: 6873

DATE COMPLAINT FILED: Sept. 22, 2014

DATE OF NOTIFICATION: Sept. 25, 2014

DATE OF LAST RESPONSE: Nov. 17, 2014

DATE ACTIVATED: Jan. 14, 2015

EXPIRATION OF STATUTE OF LIMITATIONS:

February 2009-Ongoing<sup>1</sup>

ELECTION CYCLE: 2004-2016

**COMPLAINANT:**

Craig Holman,  
Public Citizen

Stephen Spaulding  
Common Cause

Evelin Curz  
Cynthia Murray  
Organization United for Respect at Walmart

**RESPONDENTS:**

Wal-Mart Stores, Inc.

Wal-Mart Stores, Inc. PAC for Responsible  
Government and R. Lee Culpepper in his official  
capacity as treasurer

**RELEVANT STATUTES:**

52 U.S.C. § 30118

11 C.F.R. § 114.5(b)

**INTERNAL REPORTS CHECKED:**

Disclosure Reports; Commission Indices

**FEDERAL AGENCIES CHECKED:**

None

<sup>1</sup> The challenged activity here appears to have commenced sometime in February 2004 and has continued through the present. See Compl. at 3 (citing Renee Dudley, *Wal-Mart to HP Reap Worker Political Donations Through Charities*, BLOOMBERG-NEWS (Dec. 23, 2013) (Attachment C of Complaint)).

1    **I.    INTRODUCTION**

2            This matter involves allegations that Wal-Mart Stores, Inc. ("Wal-Mart") improperly  
3    exchanged treasury funds for voluntary contributions by operating a charitable matching  
4    program that encourages contributions to its separate segregated fund, Wal-Mart Stores Inc. PAC  
5    for Responsible Government ("WALPAC"). Under the WALPAC matching program, for each  
6    dollar an employee or "associate" contributes to WALPAC, Wal-Mart makes a \$2 charitable  
7    donation to Wal-Mart Associates in Critical Need a/k/a Associates in Critical Need Trust  
8    ("ACNT"), an Internal Revenue Code 501(c)(3) organization that provides funds to Wal-Mart  
9    employees who experience financial hardships.

10           Respondents deny that they violated the law, asserting that no statute, regulation, or other  
11    Commission guidance prohibits the WALPAC matching program.<sup>2</sup> They note that, in the  
12    advisory opinion process, the Commission has long construed corporate matching programs  
13    designed to increase PAC participation as permissible "solicitation expenses," so long as no  
14    individual contributor obtains a tangible benefit from either the SSF or the designated charity as  
15    a result of that participation.<sup>3</sup> The Respondents represent that no Wal-Mart employees received  
16    assistance from the charitable program because of their participation in the matching program.  
17    Therefore, the Commission should likewise find that the WALPAC matching program does not  
18    violate the Act.<sup>4</sup>

19           As set forth below, the Commission has yet to address a perfectly comparable matching  
20    program in either its advisory or enforcement role. Nonetheless, we conclude that Wal-Mart's

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<sup>2</sup>        Resp. at 1.

<sup>3</sup>        *Id.* at 2, 4.

<sup>4</sup>        *Id.*

1 donations to ACNT under the WALPAC matching program appear to qualify as permissible  
2 solicitation expenses, consistent with the Commission's historical treatment of other matching  
3 arrangements. Moreover, whatever indirect financial benefit a particular participant may  
4 arguably receive as a result of participating in the program under the circumstances presented  
5 here would be *de minimis* and would not warrant further enforcement proceedings in any event.

6 **II. FACTUAL BACKGROUND**

7 Wal-Mart is a retail corporation based in Bentonville, Arkansas. WALPAC, Wal-Mart's  
8 SSF, was first formed in 1970 and is a registered political committee with the Commission. In  
9 2001, Wal-Mart established ACNT, whose mission is "to provide financial aid to Wal-Mart  
10 Associates when they experience extreme financial hardship."<sup>5</sup> Since its inception, ACNT has  
11 made over 110,000 grants totaling over \$100 million to Wal-Mart employees who experience "a  
12 demonstrable economic hardship," such as a serious medical illness, natural disaster, or  
13 homelessness.<sup>6</sup> Grants are capped at \$1,500 during an employee's career with Wal-Mart.<sup>7</sup>

14 In 2004, Wal-Mart began soliciting its restricted class employees to contribute to  
15 WALPAC by offering to double the amount of any such contributions in corporate donations to  
16 ACNT.<sup>8</sup> According to the Respondents, since January 2011, a total of 17,853 members of Wal-  
17 Mart's management have contributed to WALPAC.<sup>9</sup> Respondents represent that only a small  
18 proportion of WALPAC contributors received ACNT grants.<sup>10</sup> For example, in fiscal year 2014,

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<sup>5</sup> ACNT 2012 Form 990 (June 13, 2013) (Attachment A of Complaint).

<sup>6</sup> Resp. at 3, ACNT Program Guidelines (Attachment 2 of Response).

<sup>7</sup> Resp. at 4.

<sup>8</sup> *Id.* at 2.

<sup>9</sup> *Id.* at 4.

<sup>10</sup> *Id.*

1 ACNT awarded 15,740 grants to Wal-Mart employees, of which only 39 grants were awarded to  
2 individuals who contributed to WALPAC, or .0025% of all grants in 2014.<sup>11</sup> Wal-Mart has also  
3 submitted a sworn affidavit averring that "the ACNT grant request form does not question  
4 whether the applying associate contributes to WALPAC" and that "there is no reference to  
5 WALPAC at any stage of the application process."<sup>12</sup>

6 According to ACNT's financial statements,<sup>13</sup> in 2012 ACNT received contributions and  
7 other revenue totaling over \$16.7 million. ACNT received \$5.2 million of that revenue from  
8 Wal-Mart associates, \$3.5 million from Wal-Mart pursuant to the WALPAC matching program,  
9 and another \$8 million from the Walton Family Foundation.<sup>14</sup> ACNT made \$10.1 million in  
10 critical need payments to qualified employees that year.<sup>15</sup> In 2013, ACNT received almost \$15  
11 million in contributions and other revenue, with Wal-Mart associates contributing over \$5.3  
12 million, Wal-Mart contributing \$3.6 million pursuant to the WALPAC matching program, the  
13 Walton Family Foundation contributing \$4 million, and the Wal-Mart Foundation contributing  
14 \$2 million.<sup>16</sup> ACNT's critical need payments totaled approximately \$13.8 million in 2013.<sup>17</sup>

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<sup>11</sup> *Id.* (citing Affidavit of Emily Reynolds ¶¶ 8, 10 (Nov. 13, 2014) ("Reynolds Aff.") (Attachment 4 of Response)).

<sup>12</sup> Reynolds Aff. ¶ 7.

<sup>13</sup> Compl., Attach. B (ACNT Financial Statements (Jan. 31, 2013; Jan. 31, 2012)). The Complaint appears to cite to drafts of the financial statements, but the Respondents also rely on the same information. *See* Resp. at 3 n.9 (comparing employee contributions to those made by Wal-Mart itself). For present purposes we therefore accept the accuracy of that information.

<sup>14</sup> Comp., Attach. B at 3; Resp. at 3 n.9.

<sup>15</sup> Comp., Attach. B at 3.

<sup>16</sup> *Id.*; Resp. at 3 n.9.

<sup>17</sup> Comp., Attach. B at 3.

III. LEGAL ANALYSIS

A. Prior Commission Treatment of Charitable Matching Programs and the Prohibition on Exchanging Treasury Monies for Voluntary Contributions

The Act prohibits corporations from making contributions to any federal candidate or political committee.<sup>18</sup> Corporations may nonetheless use treasury funds for the establishment, administration, and solicitation of contributions to an SSF.<sup>19</sup> They may not use that process, however, "as a means of exchanging treasury monies for voluntary contributions."<sup>20</sup> In this respect, Commission regulations specify that a corporation may not pay a contributor for his contribution "through a bonus, expense account, or other form of direct or indirect compensation."<sup>21</sup>

The Commission has determined that a corporation may offer to match the voluntary political contributions of relevant employees with charitable donations, so long as "the individual contributor to the separate segregated fund would not receive a financial, tax, or other tangible benefit from either the corporation or the recipient charities, thus avoiding an exchange of corporate treasury monies for voluntary contributions."<sup>22</sup> The Commission has treated the cost of such matching programs as permissible solicitation expenses.<sup>23</sup> The Commission has

<sup>18</sup> 52 U.S.C. § 30118(a).

<sup>19</sup> *See id.* § 30118(b)(2); 11 C.F.R. § 114.5(b).

<sup>20</sup> 11 C.F.R. § 114.5(b).

<sup>21</sup> *Id.* § 114.5(b)(1).

<sup>22</sup> Advisory Op. 1994-07 (GEON PAC) (permitting match to charity of PAC donor's own choosing, citing Advisory Opinions 1994-3, 1990-6, 1989-9, and 1989-7). *Accord* Advisory Op. 1994-03 (EnviroSource, Inc.) (permitting matching program where "PAC contributors will not receive any financial benefit from either the corporation or the charity as a result of his or her participation."); Advisory Op. 2003-04 (Freeport) (permitting corporate matching program where "each contributor to the PAC will be given written notice that he or she cannot receive any tangible benefit from the charitable entity in exchange for the matching contribution.").

<sup>23</sup> *See supra* note 22.

1 previously been divided, however, over whether a corporation may solicit contributions to its  
2 SSF through an offer to donate to a charity twice the amount of any voluntary contribution to the  
3 SSF.<sup>24</sup>

4           **B.     The WALPAC Matching Program Does Not Appear to Violate the Act or**  
5           **Commission Regulations Under the Circumstances Presented Here.**  
6

7           The Complaint alleges that Wal-Mart is improperly “trading general-treasury funds for  
8 contributions” through its two-for-one matching program.<sup>25</sup> The Complaint contends the  
9 corporation’s donation to the charity constitutes a “form of indirect compensation” to a  
10 participating employee in at least two respects.<sup>26</sup> First, because an employee can leverage or  
11 convert his or her contribution to WALPAC into a larger contribution to ACNT, an employee  
12 may make a donation to ACNT through the program with a lesser financial burden than doing so  
13 directly.<sup>27</sup> Second, because the sole intended beneficiaries of ACNT are Wal-Mart employees,  
14 and employees who contribute through the matching program remain eligible to receive grants  
15 from ACNT, Wal-Mart is providing a direct (albeit potential) financial benefit to its employees  
16 in return for their WALPAC contributions.<sup>28</sup> The Complaint further alleges that the WALPAC

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<sup>24</sup> Advisory Op. Request 2009-03 (IntercontinentalExchange, Inc.) (“AOR 2009-03”). In AOR 2009-03, the requestor proposed to make up to a \$2 charitable donation for every \$1 a PAC contributor made to the SSF. This Office submitted a proposed draft advisory opinion that would have approved the request, reasoning that the double matching program would be a permissible solicitation expense so long as the PAC contributors received “no tangible benefit or premium in exchange for their contributions to the SSF.” Draft AO 2009-03 (Apr. 9, 2009). The Commission failed to approve that draft by a vote of 3-3. Certification, AOR 2009-03 (Apr. 21, 2009).

<sup>25</sup> Comp. at 3.

<sup>26</sup> *Id.* at 4.

<sup>27</sup> *Id.* .

<sup>28</sup> *Id.* at 5.

1 matching program exerts an "improper coercive pressure" on Wal-Mart's employees to  
2 contribute to its SSF in violation of the anti-coercion provisions of the Act and regulations.<sup>29</sup>

3 Respondents contend that the matching program is permissible under the Act. The  
4 circumstances presented here are novel, and the Commission has yet to address them squarely.  
5 Nonetheless, on balance we believe that the WALPAC matching program does not give rise to  
6 an impermissible exchange of corporate funds for contributions under the terms of the  
7 Commission's implementing regulations and analogous precedent.

8 First, the Complaint asserts that Wal-Mart employees receive a direct benefit as a result  
9 of their eligibility for grants generally. We conclude that the facts here do not support that claim.  
10 In determining who is eligible to receive a grant, it appears that the charity does not assess  
11 whether an employee made a political contribution to the SSF.<sup>30</sup> Although some WALPAC  
12 donors have received ACNT grants, the Response represents that there is "no correlation  
13 between the amount they have contributed and the amount they have received in grant funds to  
14 cover hardship circumstances."<sup>31</sup> According to ACNT's Program Guidelines, grants are  
15 available to both hourly Wal-Mart associates — who are not members of the restricted class and,  
16 thus, not solicited in connection with the matching program — as well as salaried members of  
17 management. Further, to receive a benefit from the charity, claimants must demonstrate that  
18 they satisfy certain qualifying circumstances reflecting financial hardship, such as serious  
19 medical illness, death of an eligible dependent, natural disaster, or homelessness.<sup>32</sup> The  
20 Guidelines do not include making contributions to WALPAC as a factor in awarding grants, and

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<sup>29</sup> *Id.*

<sup>30</sup> Resp. at 4.

<sup>31</sup> *Id.*

<sup>32</sup> Resp., Attach. 2.

1 according to Respondents, the ACNT grant request form does not ask whether an applicant has  
2 contributed to WALPAC.<sup>33</sup> Respondents also represent that Wal-Mart has never suggested that  
3 WALPAC contributors should look for ways to apply for an ACNT grant.<sup>34</sup> The program  
4 therefore appears consistent in this respect with other charitable matching programs that the  
5 Commission has previously approved — notwithstanding that this program involves a charity  
6 that provides grants to Wal-Mart employees who satisfy the charity's exigency requirements —  
7 because receiving a grant from ACNT remains entirely unrelated to whether the particular  
8 recipient contributed to WALPAC.<sup>35</sup>

9 As to the ratio of the charitable payment to the size of the SSF contribution, the  
10 Commission previously has been divided over whether a two-to-one match constitutes a  
11 permissible exchange of corporate funds for voluntary contributions. It is true that an individual  
12 in Wal-Mart's restricted class who wishes to make a donation to ACNT would be able to halve  
13 the out-of-pocket expense of making a charitable contribution of a particular size, up to the  
14 allowable maximum for SSF contributions. But reducing an individual donor's burden with  
15 respect to making a donation of a particular size to a specified charity, standing alone, does not  
16 in our view constitute indirect "compensation" to the individual. Hence, it would not result in a  
17 payment to the individual contributor "through a bonus, expense account, or other form of direct  
18 or indirect compensation," as contemplated under the terms of the relevant Commission

<sup>33</sup> *Id.*; Resp. at 4 (citing Reynolds Aff. ¶ 7).

<sup>34</sup> Resp. at 4; Reynolds Aff. ¶ 6 ("[T]o the best of our knowledge and belief, [WALPAC] has never suggested that WALPAC contributors should apply to ACNT for a grant.").

<sup>35</sup> The Commission has previously recognized in its advisory opinion process that the IRS also has concluded that charitable matching programs that do not benefit the individual making the contribution do not result in "compensation" to that contributor. See Taxation of Charity-PAC Contribution Matching Programs, IRS Gen. Counsel Mem. 39,877 (Aug. 27, 1992), <http://www.irs.gov/pub/irs-tegc/gcm39877.pdf>.



1 regulation.<sup>36</sup> And because the record reflects that making a contribution to WALPAC plays no  
2 part in determining eligibility for an ACNT "critical need" grant, it appears that doubling the  
3 amount of a contribution to WALPAC as a charitable donation to ACNT merely increases the  
4 permissible solicitation expenses of Wal-Mart in connection with its management of the  
5 program.<sup>37</sup>

6 Even if the Commission were to construe the benefit of a two-for-one matching  
7 contribution as a form of compensation to the donor, however, the likelihood of any particular  
8 participating donor being selected to receive an ACNT grant would be so minimal as to be *de*  
9 *minimis*. Indeed, according to the Response, only .0025% of WALPAC donors who participated  
10 in the matching program received ACNT grants in fiscal year 2014. Consequently, we believe  
11 that dismissal is appropriate here.

12 The Complaint also suggests that a double-matching program may be coercive.<sup>38</sup> The  
13 Act prohibits an SSF from making contributions or expenditures secured by physical force, job  
14 discrimination, financial reprisals, or the threat thereof.<sup>39</sup> The record here contains no  
15 information suggesting any employees were threatened or forced to contribute through the  
16 WALPAC matching program. And merely creating a financial incentive to make a contribution  
17 to the SSF does not appear to violate the terms of the anti-coercion provisions of the Act and the  
18 Commission's implementing regulations.

<sup>36</sup> 11 C.F.R. § 114.5(b)(1).

<sup>37</sup> *Id.* § 114.5(b); *see supra* note 22 (citing advisory opinions in which the Commission has approved the cost associated with SSF charitable matching programs as a form of permissible SSF solicitation expense).

<sup>38</sup> Specifically, the Complaint contends that the matching program exerts an "improper coercive pressure" on employees in the restricted class to contribute to the SSF. Compl. at 5.

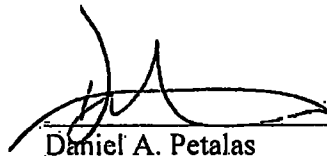
<sup>39</sup> 52 U.S.C. § 30118(b)(3)(A); 11 C.F.R. § 114.5(a).


Accordingly, for the foregoing reasons we recommend that the Commission dismiss the allegation that Wal-Mart or WALPAC violated 52 U.S.C. § 30118(a) and 11 C.F.R. § 114.5(b).<sup>40</sup>

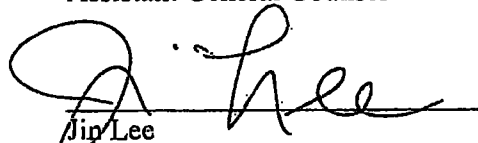
**IV. RECOMMENDATIONS**

1. Dismiss the allegation that Wal-Mart Stores, Inc. and Wal-Mart Stores, Inc. PAC for Responsible Government and R. Lee Culpepper in his official capacity as treasurer violated 52 U.S.C. § 30118(a) and 11 C.F.R. § 114.5(b);
2. Approve the attached Factual and Legal Analysis;
3. Approve the appropriate letters; and
4. Close the file.

Date: 5/12/15

  
Daniel A. Petalas  
Associate General Counsel

  
Peter Blumberg  
Assistant General Counsel

  
Jin Lee  
Attorney

<sup>40</sup> See *Heckler v. Chaney*, 470 U.S. 821 (1985).